No. 89-335

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT E. BORMANN, DOMENICK R. FERRANTINO, TIMOTHY J. FERRITER, HARRY M. GARDNER, RONALD A. JACOBSEN, JAMES W. MEYERS, HELMUT SAARTS, CORNELIUS J. SMITH, KARL ORTLER, ALBERT J. TAGGI, NEVILLE SMITH and THOMAS J. MCGUIRE,

Petitioners,

—v.—

AT&T COMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR CERTIORARI

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September 22, 1989

**Counsel of Record*

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QUESTIONS RESTATED

1. Whether the District Court's decision to grant judgment to the Respondent and dismiss the Complaint, after a plenary trial pursuant to Federal Rule of Civil Procedure 42(b), constituted, in effect, a grant of summary judgment and an abuse of discretion?

2. Whether the District Court erred in finding that Petitioners knowingly and voluntarily waived their rights under the Age Discrimination in Employment Act by signing a Release which the Court found: (1) was written in clear and unambiguous language, (2) specifically referred to age discrimination claims, (3) apprised Petitioners of their right to counsel, and (4) provided consideration in excess of that to which Petitioners otherwise would have been entitled?

STATEMENT REQUIRED BY RULE 28.1

AT&T Communications, Inc., is a wholly-owned subsidiary of American Telephone and Telegraph Company ("AT&T"). AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Cincinnati Bell Inc.; Edelson Technology Partners, L.P.; AT&T/Ricoh, Ltd.; AT&T Taiwan Telecommunications Co.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; ShareTech, Inc.; Covidea; Counterpoint Computers, Inc.; Omnicad Technology Corporation; Intermetrics, Inc.; AT&T Microelectronia de Espana, S.A.; Mitek, Inc.; Resound Corporation; Global Transactions Services Company; and Sun Microsystems, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-335

ROBERT E. BORMANN, DOMENICK R. FERRANTINO, TIMOTHY J. FERRITER, HARRY M. GARDNER, RONALD A. JACOBSEN, JAMES W. MEYERS, HELMUT SAARTS, CORNELIUS J. SMITH, KARL ORTLER, ALBERT J. TAGGI, NEVILLE SMITH and THOMAS J. MCGUIRE,

Petitioners,

—v.—

AT&T COMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR CERTIORARI

Defendant-Respondent AT&T Communications, Inc. ("AT&T") respectfully prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (the "Petition") be denied.

CITATIONS TO OPINIONS BELOW

Plaintiffs-Petitioners ("Plaintiffs") seek review of *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399 (2d Cir. 1989) (Feinberg, J.), reproduced as Appendix A to the Petition ("Pet. App. A"), at A-1 to A-22, which affirmed two unreported decisions of the United States District Court for the Southern Dis-

trict of New York (Brieant, C.J.): (1) a Memorandum and Order denying AT&T's motion for summary judgment and (2) post-trial findings of fact and conclusions of law dismissing Plaintiffs' Complaint.[1]

COUNTERSTATEMENT OF THE CASE

Plaintiffs are former AT&T managers who were laid off in early 1986 during a reduction-in-force. They commenced the present action on June 12, 1987, alleging that AT&T had dismissed them because of their age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). *See* Complaint, *passim*, DSA 4-36.

In its answer, AT&T denied the material allegations of the Complaint and interposed various defenses, including the fact that each Plaintiff had executed a Separation Agreement and Release (the "Release") which expressly waived any claim against AT&T for age discrimination. (A copy of the Release is reproduced in the Appendix hereto ("App."), at 1a-4a.)[2] *See* Answer, Fifth Affirmative Defense, DSA 60.

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1 The District Court's post-trial findings of fact and conclusions of law are reproduced in Defendant's Supplemental Appendix below ("DSA"), at 1300-17, and in Appendix B to the Petition ("Pet. App. B"), at A-24 to A-52. The District Court's Memorandum and Order denying summary judgment is reproduced at DSA 1058-66 and in Appendix C to the Petition ("Pet. App. C"), at A-53 to A-68.

2 The Release was part of the Company's "Termination Payment Plan for Surplus Management Employees and Summary Plan Description" (the "Plan") which had been adopted to provide separation benefits to managers affected by a reduction-in-force. DSA 1320-33. The Plan offered those employees who were designated as "surplus" a choice of two severance payment options. *See* DSA 1321. One option was unconditional, and allowed a surplus manager to choose a lump-sum termination payment equal to 3% of the manager's annual base pay multiplied by the manager's number of years of service, up to a maximum of twenty years. *Id.* Under this option, surplus managers with twenty or more years of service, like the Plaintiffs (Petition at 6), would each receive 60% of one year's salary (3% x 20 years = 60%). The second option enabled the surplus manager to elect, at his or her

On the basis of this defense, AT&T moved for summary judgment on December 31, 1987. In a Memorandum and Order dated March 28, 1988, the District Court concluded that "an unsupervised waiver of rights can be a bar to a private action under the ADEA, so long as it is knowingly and voluntarily given." DSA 1060, Pet. App. C at A-57. The Court, however, denied AT&T's motion for summary judgment, concluding that a factual dispute existed with respect to whether authorized AT&T managers had misrepresented the enforceability of the Release by stating or implying that "the releases were of doubtful legal enforceability." DSA 1064-65, Pet. App. C at A-64 to A-66. The District Court ordered a separate trial on this issue pursuant to Federal Rule of Civil Procedure 42(b).[3] DSA 1066, Pet. App. C at A-68.

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sole discretion, to increase the multiplier from 3% to 5% of annual base pay. DSA 1321. Under this option, a surplus manager with twenty or more years of service would receive 100% of one year's salary (5% x 20 years = 100%). This option, however, was conditioned on the manager's signing the Release, which is a five-page document written in clear and unambiguous language, specifically referring to age discrimination. *See* Release ¶ 3, App. at 1a.

The Release contains a general release and covenant-not-to-sue which "includes, but is not limited to, claims arising under federal, state, or local laws prohibiting age . . . discrimination. . . ." *Id.* ¶ 5, App. at 2a. Following an integration clause, the Release concludes with the following legend in capital letters, appearing directly above the signature lines:

> BY SIGNING THIS SEPARATION AGREEMENT AND RELEASE, I STATE THAT: I HAVE READ IT; I UNDERSTAND IT AND KNOW THAT I AM GIVING UP IMPORTANT RIGHTS; I AGREE WITH EVERYTHING IN IT; I AM AWARE OF MY RIGHT TO CONSULT AN ATTORNEY BEFORE SIGNING IT; AND I HAVE SIGNED IT KNOWINGLY AND VOLUNTARILY.

Id., p. 5, App. at 4a. Each of the Plaintiffs selected the 5% option and executed the Release. *See* DSA 1334-1405.

3 The Court also held that: (a) Plaintiffs had sufficient time to consider the Release; (b) the Release was clear and unambiguous; and (c) the Plaintiffs had not been compelled to sign the Release by "economic duress." DSA 1061-63, Pet. App. C at A-59 to A-63.

The case was tried to the court sitting without a jury on November 21 and 22, 1988. *See* DSA 1067-1317. Following the trial, the District Court dismissed the Complaint based on its findings that AT&T's personnel managers had not made any misrepresentations regarding the enforceability of the Release and that the Releases were signed knowingly, voluntarily and for valuable consideration. DSA 1300-17, Pet. App. B at A-24 to A-52.

Plaintiffs appealed the District Court's judgment to the United States Court of Appeals for the Second Circuit, which affirmed the judgment in all respects. *Bormann*, 875 F.2d 399, Pet. App. A at A-1. Citing similar cases from the Third, Sixth and Eighth Circuits, the Court of Appeals held that an "unsupervised waiver" of rights under the ADEA—i.e., a release supported by consideration and executed without the prior approval of the agency charged with the Act's enforcement, the Equal Employment Opportunity Commission ("EEOC")—is enforceable if knowing and voluntary. *Id.* at 401-02, Pet. App. A at A-8 to A-14. The Court also found "no error in the district court's credibility determinations, findings of fact and conclusions of law and in its decision, therefore, to grant judgment to AT&T and to dismiss the complaint." *Id.* at 403-04, Pet. App. A at A-18.

Plaintiffs then filed their Petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Plaintiffs have not presented this Court with any issue that would merit review. Plaintiffs' claim in Point I of the Petition, that the District Court should not have granted AT&T's motion for summary judgment, is wrong as a matter of fact, and, in all events, would not justify review by this Court. Despite Plaintiff's insistence, the District Court did not grant summary judgment to AT&T, but denied it. Judgment—not summary judgment—was entered against Plaintiffs only after a plenary trial on the issue which had prompted the District Court to deny AT&T's motion: whether AT&T personnel misrepresented the

enforceability of the Release. Ordering a separate trial on that issue was entirely appropriate under Federal Rule of Civil Procedure 42, and does not raise an issue worthy of this Court's attention.

Point II of Plaintiffs' Petition is equally unconvincing. Every circuit which has considered the issue has concluded that unsupervised waivers of ADEA claims are lawful when knowing and voluntary. In the case *sub judice*, the record establishes beyond peradventure that each Plaintiff signed the Release knowingly and voluntarily, in exchange for valuable consideration, and that no AT&T manager misrepresented the enforceability of the Release. The District Court reached this conclusion, the Second Circuit affirmed it, and no basis exists for this Court's review. Furthermore, the Second Circuit was entirely correct in concluding that the recent introduction of legislation regarding unsupervised waivers of ADEA claims has no bearing on the enforceability of the Release in the present case and does not represent an authoritative interpretation of what the ADEA meant when it was enacted in 1967.

The Second Circuit's holding is a correct application of well-settled principles and does not conflict with the decision of any other court of appeals. There is, therefore, no reason to grant the Petition.

ARGUMENT

I.

THE ISSUE OF WHETHER THE DISTRICT COURT'S DECISION TO GRANT JUDGMENT TO AT&T AND DISMISS THE COMPLAINT AFTER A PLENARY TRIAL PURSUANT TO FED. R. CIV. P. 42(b), WAS, IN EFFECT, AN ERRONEOUS GRANT OF SUMMARY JUDGMENT, DOES NOT MERIT REVIEW BY THIS COURT, AND, IN ALL EVENTS,WAS CORRECTLY DECIDED BELOW

Plaintiffs' first argument for granting the writ is that the District Court erroneously "granted" AT&T's motion for summary judgment. Petition at i and 13-16. The argument is entirely without merit. There is no assertion of a conflict among the circuits, the issue does not present a recurring theme which should be reviewed by this Court and the question has no importance beyond the parties involved in the present litigation.

The record clearly establishes that the District Court denied AT&T's motion for summary judgment and ordered a trial with respect to the issue of alleged misrepresentations by AT&T managers. Plaintiffs concede as much when they state that "[r]ather than deciding that issue on the pleadings, the Court set the matter down for trial." Petition at 15. Moreover, the District Court's ruling on AT&T's motion for summary judgment makes clear that the motion was denied:

> In support of its motion, the defendant submitted the affidavits of Mr. Gerdes and Mr. Hopeck which state that in response to questions regarding the enforceability of the releases AT&T management advised the employees to consult with their own attorneys, tax advisors or financial consultants. Mr. Gerdes further states that he never advised Mr. McGuire that the separation agreement and release was unenforceable. These accounts contradict those offered by the plaintiffs, and present a genuine issue of material fact and an issue of credibility which may not

> properly be resolved by affidavit. *The Court, therefore, denies the defendant's motion for summary judgment.*
>
> * * *
>
> Because only one fact issue, whether [AT&T] managers misrepresented the enforceability of the [Release], prevents an award of summary judgment for the defendants [sic], the Court, in the interests of economy, orders a separate trial on this issue pursuant to Rule 42(b).

DSA 1064-65 and 1066, Pet. App. C at A-65 to A-66 and A-68 (emphasis added). The District Court's decision to order a separate trial was entirely proper, and undermines totally Plaintiffs' assertion that summary judgment was granted.

It is well-established that Federal Rule of Civil Procedure 42(b) grants trial courts broad discretion to order separate trials "of any separate issue . . . or issues" in order to further "convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. . . ."[4] *See generally* 9 C.A. Wright and A.R. Miller, *Federal Practice and Procedure* § 2388, at 279-84 (1971 and Supp. 1989) and cases therein. Determining the effect of the Release in a separate trial before dealing with Plaintiffs' substantive claims, as the District Court did here, is well within the parameters of Rule 42(b). *See id.* and *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 83, 87 (2d Cir. 1939) (Clark, J., concurring). Accordingly, Plaintiffs' argument does not provide a basis for granting the Petition for certiorari.[5]

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4 The authority of the Court to order a separate trial is further supplemented by the Court's broad inherent power to regulate litigation before it. *See, e.g., Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-631 (1962); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 951 (9th Cir. 1976).

5 Even if summary judgment had been granted, certiorari would still not be appropriate. The Court of Appeals below held that the District Court "applied the appropriate standard on a motior for summary judgment. . . ." *Bormann*, 875 F.2d at 404, Pet. App. A at A-20. This Court spoke definitively on that standard just three years ago and

II.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS KNOWINGLY AND VOLUNTARILY WAIVED THEIR RIGHTS UNDER THE ADEA BY SIGNING A RELEASE WHICH (1) WAS WRITTEN IN CLEAR AND UNAMBIGUOUS LANGUAGE, (2) SPECIFICALLY REFERRED TO AGE DISCRIMINATION CLAIMS, (3) APPRISED PETITIONERS OF THEIR RIGHT TO COUNSEL AND (4) PROVIDED CONSIDERATION IN EXCESS OF THAT TO WHICH PLAINTIFFS OTHERWISE WOULD HAVE BEEN ENTITLED

Plaintiffs contend that the District Court erred in holding that they knowingly and voluntarily waived their rights under the ADEA by signing the Release. In support of their position, Plaintiffs present two arguments: First, that any waiver of rights under the ADEA is *per se* invalid (Petition at 27-28), and, second, that even if such waivers are not *per se* invalid, the facts in the present case do not support the District Court's factual finding that the Releases were signed knowingly and voluntarily (*id.* at 18, 20-21, 24 and 26). Plaintiffs' arguments are entirely without merit, and do not constitute a reason for review by this Court.

A. The Courts Below Correctly Followed the Uniform Rule among the Lower Federal Courts that Unsupervised Waivers of ADEA Rights Are Lawful If They Are Knowing and Voluntary

The question of whether an unsupervised waiver of rights is permissible under the ADEA has been considered by numerous courts of appeals, each of which has responded in the affirma-

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nothing about the present case requires the Court to revisit the issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 317 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

tive.[6] The seminal case is *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986) ("*Runyan*"). *Runyan* and its progeny have carefully analyzed the interplay among the ADEA, the Fair Labor Standards Act, 29 U.S.C. §§ 216 and 217 (1982) ("FLSA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), concluding that an unsupervised private release, knowingly and voluntarily signed, is valid under the ADEA. *Runyan*, 787 F.2d at 1041-43; *accord* cases cited *supra* note 6; *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (validity of Title VII releases).[7] These courts have uniformly rejected the suggestion that the FLSA controls the settlement of ADEA claims, focusing instead on a comparison between the ADEA and Title VII.

Under Title VII, a claim of discrimination may be released provided the release is made knowingly and voluntarily. *Alexander v. Gardner-Denver*, 415 U.S. at 52 & n.15. Since Congress intended that claims under both Title VII and the ADEA

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6 *Shaheen v. B.F. Goodrich Co.*, 873 F.2d 105, 107 (6th Cir. 1989) (per curiam); *Cirillo v. Arco Chem. Co.*, 862 F.2d 448, 451 n.1 (3d Cir. 1988); *Coventry v. United States Steel Corp.*, 856 F.2d 514, 521-22 n.8 (3d Cir. 1988); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987); *Dorosiewicz v. Kayser-Roth Hosiery, Inc.*, No. 86-3163 (4th Cir. June 24, 1987) (unpublished); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987); *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1030 (8th Cir. 1986). *See also Duke v. Uniroyal, Inc.*, No. 87-741-CIV-5-H (E.D.N.C. June 20, 1989) (LEXIS, Genfed library, Dist file); *O'Brien v. Beatrice Cos.*, No. 85 C 5462 (N.D. Ill. June 17, 1988) (LEXIS, Genfed library, Dist file); *EEOC v. American Express Publishing Corp.*, 681 F. Supp. 216, 219 (S.D.N.Y. 1988); *DiMartino v. City of Hartford*, 636 F. Supp. 1241, 1245-48 (D. Conn. 1986).

7 Rights under other federal statutes governing the employer-employee relationship also can be waived. *E.g.*, *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361-62 (1952) (FELA); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1942) (Jones Act); *Shaheen v. B.F. Goodrich Co.*, 873 F.2d at 107 (Equal Pay Act and 42 U.S.C. § 1981); *Roadway Express, Inc. v. NLRB*, 647 F.2d 415 (4th Cir. 1981) (NLRA). *See also Town of Newton v. Rumery*, 480 U.S. 386 (1987) (release of rights under 42 U.S.C. § 1983).

be resolved without delay, *Burns v. Equitable Life Assurance Society of the United States*, 696 F.2d 21, 24 n.2 (2d Cir. 1982), *cert. denied*, 464 U.S. 933 (1983), and invested the statutes with a common scheme for achieving the goal of cooperation and voluntary compliance, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979), analogizing the ADEA to Title VII in the context of the present case is entirely appropriate.

Perhaps recognizing this fact,[8] and being unable to articulate any reason for departure from the long line of well-reasoned decisions that have sustained knowing and voluntary waivers of ADEA rights, Plaintiffs suggest that the recent introduction of congressional bills[9] seeking to restrict the use of waivers of ADEA claims demonstrates that the ADEA does not permit an unsupervised waiver of rights. Petition at 27-28. Plaintiffs' suggestion is nonsensical. The introduction of this legislation does not constitute an authoritative interpretation of what the ADEA meant when it was enacted in 1967. *See Pierce v. Underwood*, ____ U.S. ____, ____, 108 S. Ct. 2541, 2550-51 (1988). Indeed, if any inference can be drawn from the current Congressional activity in this area, it is that Congress acknowledges that Releases are permitted under the ADEA and proposes legislation to alter that fact.

In all events, the Second Circuit's decision does not conflict with the decision of any other court of appeals, and Plaintiffs have failed to articulate any reason justifying this Court's review.

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8 Plaintiffs concede as much when they state that "the waiver that they executed does not bar them from pursuing their claim because it does not fulfill the requirements for a 'knowing' and 'voluntary' waiver of their rights." Petition at 17.

9 *See* Age Discrimination in Employment Waiver Protection Act, S. 54, 101st Cong., 1st Sess., 135 Cong. Rec. S357 (daily ed. Jan. 25, 1989) and H.R. 1452, 101st Cong., 1st Sess., 135 Cong. Rec. E816 (daily ed. March 15, 1989) (statement of Rep. Hawkins introducing House version of Age Discrimination in Employment Waiver Protection Act).

B. The District Court's Conclusion that Plaintiffs Knowingly and Voluntarily Signed the Releases Is Not Clearly Erroneous, and Does Not Merit Review by This Court

Plaintiffs argue that the District Court erroneously concluded that the Releases were knowingly and voluntarily signed. The claim, however, represents the quintessential fact-bound issue, having no importance beyond this case and providing no basis for review by this Court.

In its March 28, 1988 opinion on AT&T's motion for summary judgment, the District Court concluded that the following facts were undisputed: (1) that Plaintiffs were "experienced executives familiar with reading and analyzing contracts" (Pet. App. C at A-59); (2) that the "release itself was written in clear and unambiguous language" and specifically referred to state and federal laws prohibiting age discrimination (*id.* at A-59 to A-60); (3) that Plaintiffs had "sufficient time to consider the release" (*id.* at A-60); (4) that Plaintiffs were not the victims of "economic duress" (*id.* at A-61); and (5) that Plaintiffs received additional consideration in exchange for the Releases (*see id.* at A-54 to A-55 and A-63). The court, however, denied AT&T's motion on the ground that a "genuine issue of material fact and an issue of credibility" existed with respect to whether AT&T personnel misrepresented the enforceability of the Releases. *Id.* at A-66 and A-68.

After a two-day trial during which the court took testimony from each of the Plaintiffs[10] and several company witnesses, the court issued its findings of fact and conclusions of law, carefully explicating the reasons for its decision that the Releases were signed knowingly and voluntarily. The court specifically rejected Plaintiffs' misrepresentation theory on the basis of credibility determinations made during the trial. Pet. App. B at A-24 to A-52.

On appeal, the Second Circuit reviewed the facts and circumstances which the District Court scrutinized in reaching its

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10 Because Neville Smith was unable to appear at the trial, it was stipulated by the parties that his deposition testimony would be used in lieu of his actual appearance. DSA 1200-04.

decision that the Releases were properly and lawfully executed, approving the District Court's approach and affirming its determination. Indeed, the Court of Appeals stated specifically:

> that the district court sufficiently examined the "totality of the circumstances" surrounding the Plan with care and concern for the rights of older workers. We also agree that the only genuine factual issue was whether the company misrepresented the effect of the releases.
>
> On the trial of this issue, we find no error in the district court's credibility determinations, findings of fact and conclusions of law. . . .

Bormann, 875 F.2d at 403, Pet. App. A at A-18.

Because a determination of whether the Releases were knowingly and voluntarily signed is a finding of fact, the standard governing appellate review of the District Court's finding is that set forth in Federal Rule of Civil Procedure 52(a): "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This standard does not allow a reviewing court to reverse the finding of the trial court merely because it would have reached a different conclusion. *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). Indeed, this Court has declared that "[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). This admonition applies even when the district court's findings are premised on physical or documentary evidence or inferences from facts, rather than merely credibility determinations. *Anderson v. City of Bessemer*, 470 U.S. at 574. Moreover, when findings are based on assessments of credibility, even greater deference to the trial court's determinations is required. *Id.* at 575. As this Court has stated: "[W]hen a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a

coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.*

Application of the foregoing principles to the facts of the present case shows that the Circuit Court applied the proper standard of review, and undermines totally Plaintiffs' bare assertion that the District Court erred in finding that the Releases were signed knowingly and voluntarily. Accordingly, there is no reason for this Court to review the decisions below.

CONCLUSION

For the reasons stated, the Petition for a writ of certiorari should be denied.

Dated: September 22, 1989

Respectfully submitted,

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APPENDIX

SEPARATION AGREEMENT AND RELEASE

In consideration of the fact that I, _____ (the Employee), have voluntarily, and of my own free will, elected to accept the termination payment in the amount of $_____ and that AT&T Communications, Inc. (the Company) has agreed to pay me a termination payment in the amount of $_____, I acknowledge and agree to the following:

1. I understand that as of _____ my employment with AT&T Communications, Inc. will cease.

2. I have been advised by the Company that I am being separated from the payroll of AT&T Communications, Inc. pursuant to the terms of the Company's surplus force reduction plan and that I am entitled to a termination payment in an amount equal to 3% of my current base pay multiplied by the number of years of net credited service, up to a maximum of 20 years. I have also been told by the Company, and understand, that I may elect, at my option, to increase my termination payment from 3% to 5% of my current base pay multiplied by the number of years of net credited service up to a maximum of 20 years, but that my election to receive this higher termination payment is expressly conditioned upon my signing this Separation Agreement and Release.

3. On a Separation Payment Option Form dated and attached hereto, I have elected to receive a 5% termination payment in return for signing this Separation Agreement and Release. I understand that this termination payment (5% rather than 3%) is being paid as consideration for my signing this Separation Agreement and Release.

4. I realize that there are various State and Federal laws that prohibit employment discrimination on the basis of age, sex, race, color, national origin, religion, handicap or veteran status and that these laws are enforced through the Equal Employment Opportunity Commission, Department of Labor and State Human Rights Agencies. I intend to give up any rights I may have under these or any other laws with respect to my

employment at AT&T Communications and acknowledge that AT&T Communications, Inc. has not (a) discriminated against me, (b) breached any express or implied contract with me or (c) otherwise acted unlawfully toward me.

5. Subject to paragraph 6 herein, on behalf of myself, my heirs, executors, administrators, successors and assigns, I release and discharge AT&T Communications, Inc., its successors, assigns, subsidiaries, affiliates, directors, officers, representatives, agents and employees ("Releasees") and the American Telephone and Telegraph Company, its successors, assigns, subsidiaries, affiliates, directors, officers, representatives, agents and employees ("Releasees") from any and all claims, including claims for attorney's fees and costs, charges, actions and causes of action with respect to, or arising out of, my employment or termination of employment with AT&T Communications, Inc. This includes, but is not limited to, claims arising under federal, state, or local laws prohibiting age, sex, race or any other forms of discrimination or claims growing out of any legal restrictions on the Company's right to terminate its employees. I agree to immediately withdraw, with prejudice, any charges, claims or actions that I instituted prior to my signing this Separation Agreement and Release and not to institute any future claims, charges or actions against AT&T Communications, Inc. or any Releasee for any reason.

6. I understand that this Separation Agreement and Release in no way affects any rights I may have for benefits under the AT&T Management Pension Plan or any other applicable AT&T benefit plan.

7. In accordance with my existing and continuing obligations to the Company, I have returned or will immediately return to the Company all Company information, including files, records, computer access codes and instruction manuals which I have in my possession. I further agree not to keep any copies of Company information. I affirm my obligation to keep all Company information confidential and not to disclose it to any third party in the future. I understand that the term "Company information" means: (a) confidential information, including

information received from third parties under confidential conditions, and (b) other technical, marketing, business or financial information, the use or disclosure of which might reasonably be construed to be contrary to the interest of the Company or its subsidiaries or affiliates.

8. I agree to keep this Separation Agreement and Release confidential and not to reveal its contents to anyone except my lawyer, my immediate family or my financial consultant.

9. This Separation Agreement and Release contains the entire agreement between the Company and me.

In the event that any one or more of the provisions contained herein shall for any reason be held to be unenforceable in any respect under the law of any state or of the United States of America, such unenforceability shall not affect any other provision of this Release, but, with respect only to that jurisdiction holding the provision to be unenforceable, this Release shall then be construed as if such unenforceable provision or provisions had never been contained herein.

BY SIGNING THIS SEPARATION AGREEMENT AND RELEASE, I STATE THAT: I HAVE READ IT; I UNDERSTAND IT AND KNOW THAT I AM GIVING UP IMPORTANT RIGHTS; I AGREE WITH EVERYTHING IN IT; I AM AWARE OF MY RIGHT TO CONSULT AN ATTORNEY BEFORE SIGNING IT; AND I HAVE SIGNED IT KNOWINGLY AND VOLUNTARILY.

Date: _____

Employee Signature

Date: _____

Employee Name Printed

Date: AT&T Communications, Inc.

By _____